Petition

NO. 81-1149

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STEVE SLIGER and
FRED LADON WRIGHT,

Petitioners,

versus

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS OF RECORD

QUESTIONS PRESENTED

1. Whether Georgia's Unified Appeal Procedure violated the United States Constitution by compelling a defendant in a death penalty case to waive his right by Writ of Habeas Corpus to challenge his conviction on the ground he was denied the effective assistance of counsel and the fundamental rights secured by the Constitution and laws of the United States?

2, Whether the Georgia Unified Appeal Procedure is violative of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that it compels a defendant, in a death penalty case, to be a witness against himself and deprives the defendant of reciprocal discovery?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEVE SLIGER and
FRED LADON WRIGHT,

Petitioners,

against
STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners Steve Sliger and Fred LaDon Wright, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at _____ Ga. _____ , 282 S. E. 2d 291 (1981).

JURISDICTION

The Judgment of the Supreme Court of Georgia was entered on September 29, 1981. A timely petition for rehearing was denied on October 15, 1981, yet the Supreme Court entered a

substitute opinion and dated it September 22, 1981.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioners having asserted below and herein a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involved Article I, §9, Clause 2, of the Constitution of the United States, which provides, in relevant part:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of Rebellion or Invasion the Public Safety may require it;"

the Fifth Amendment to the Constitution of the United States which provides, in relevant part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . ;"

the Sixth Amendment to the Constitution of the United States, which provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation ; . . . and to have the Assistance of Counsel for his Defense;"

and the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deprive any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 20, 1980, the Georgia Legislature approved an act entitled "Criminal Procedure-Unified Review Procedure In Death Penalty Cases," thereby adding a new statute to the Code of Georgia, designated as Code Section 27-2538. See General Acts And Resolutions, Georgia Law, Vol. I, pp. 391, 392 (1980).

In said Act, the Legislature said, in part:

"(a) The Supreme Court shall establish by a unified motion for review procedure for the presenting to the sentencing court and the Supreme Court of Georgia of all possible challenge to the conviction, sentence, and detention of defendants upon whom the sentence of death has been imposed, which challenges now are presented for review by motion for new trial, motion to withdraw a guilty plea, appeal, writ of habeas corpus, or any other writ, motion or proceeding cognizable in the courts of this state, except a claim or proceeding challenging the competency of counsel.

(b) The Supreme Court of Georgia shall establish by rules a series of check lists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the

> trial of cases in which the death penalty is sought to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and ***either asserted*** in a timely and correct manner ***or waived*** in accordance with applicable legal requirements so that, if the defendant is convicted and the sentence of death is imposed, the record and transcript of proceedings will be complete ***for unified review*** by the sentencing court and the Supreme Court ***of all possible challenges*** to the judgment of conviction, sentence to death, and the sentence of death, and the detention of the defendant." (Emphasis added).

Pursuant to direction by the Legislature, the Supreme Court of Georgia issued a procedure to be used in all trial courts in cases wherein the death penalty was sought. Said procedure is entitled, "The Georgia Unified Appeal Procedure" and can be found at 246 Ga. A-5 through A-28, and was implemented on August 25, 1980.

On April 14, 1981, the Georgia General Assembly approved the rules of the Supreme Court of Georgia, adopted pursuant to Code Section 27-2538. See General Acts And Resolutions, Georgia Laws, Vol. I, p. 1532 (1981).

The Petitioners were indicted for Robbery and Murder on February 10, 1981.

Petitioner, Steve Sliger, was granted a bond under a Georgia statute which provides, generally, that in a Capitol Case a defendant, who has not been indicted within ninety days (90) of his arrest must, upon application, be freed on bond. The Petitioner Fred LaDon Wright, however, had not retained counsel prior to indictment and remains incarcerated today.

After notification from the District Attorney of Floyd County, Georgia, of a hearing date for the First Proceeding under the Unified Appeal Procedure, Petitioners filed a Motion To Dismiss Or In The Alternative, Motion To Stay Proceedings under the Unified Appeal Procedure. (R-1). At the hearing on the above referenced motion, the trial court denied the motion along with its amendments. (R-31), (T-11, 12).

On April 6, 1981, the Superior Court of Floyd County, Georgia, approved a Certificate For Immediate Review of its decision to deny said motion.

On April 17, 1981, the Appellant made application to the Supreme Court of Georgia to permit an immediate appeal from the decision of the Floyd Superior Court. On May 1, 1981, the Supreme Court of Georgia granted Petitioners' application for interlocutory appeal.

On September 29, 1981, the Supreme Court of Georgia affirmed the trial court and denied Petitioners any relief from the Georgia Unified Appeal Procedure.

Petitioners filed a Motion For Rehearing which was denied on October 15, 1981. In denying the rehearing, the Supreme Court of Georgia rewrote its original opinion and substituted for it a different opinion. In rewriting the original opinion, the Court changed only a few words which originally claimed that counsel for Petitioners used "specious reasoning" and that counsel's brief was "largely bereft of analysis." The Supreme Court back-dated the second opinion to reflect the same date, September 29, 1981, as the original opinion. So, the second opinion is the only recorded opinion. See ***Sliger v. State, Wright v. State,*** _____ Ga. _____ , 282 S.E. 2d 291 (1981).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners argued in the trial court and the Supreme Court of Georgia the following reasons why the Georgia Unified Appeal Procedure is in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, among other Amendments and provisions:

(a) This procedure requires the Defendant and his counsel to adhere to a prescribed schedule for preparation of the case for trial.

(b) This procedure requires that decisions be made as to defense counsel's strategy and that said strategy be revealed in the record, prior to the trial of the case.

(c) This procedure requires that certain motions be filed or defense counsel's intentions of filing certain motions be duly recorded even prior to the law requiring the filing of such motions.

(d) If defense counsel has not filed certain motions or revealed their intentions of making a contest of certain issues then this procedure mandates to the Court that the Court *shall* make sure the Defendant and his counsel know what will happen as a result of their action or inaction. This places the Court in the position of telling the defense how to run their case and interferes with the Defendant's right of no interference from the State in his defense.

(e) As a result of this procedure, the Defendant will have no control over his defense. The Defendant will have to pursue the course of events set out by the Supreme Court of Georgia, even though not timely or wise, in order to insure the State that appellant has no appellate rights later.

(f) The Defendant is not a lawyer and if his lawyer decides not to do something suggested by the Supreme Court of Georgia, and even if advised by the Court of his right to do so, he cannot give an intelligent and voluntary waiver of technical issues and know the consequences of his actions.

(g) The Supreme Court of Georgia, by these rules, is assuming that all issues will be scrutinized prior to trial and that it will be discerned what principles of law are or are not applicable to the facts. How does the defense know the facts of the case with our present laws regarding discovery in criminal cases in this State? How does the Court know the facts of the case and still remain impartial?

(h) These rules call for a pre-trial of a criminal case. This calls for trying the case before the trial. This calls for the structuring of the case by the Court by limiting and restricting the activity of the defense. This is a breakdown of due process.

(i) These rules are arbitrary and capricious. They do not show their purpose to be to insure the Defendant a fair trial. They show their purpose to be a prescribed pre-packaging of a criminal case, from beginning to end. They demand that the defense know everything about the case, prior to trial, yet they do not open the doors to discovery, as under the Federal Rules. Then if the defense failed to do what the Court prescribed, the Defendant is punished later for the lack of his counsel's clairvoyance.

The Supreme Court of Georgia decided that the Petitioners' argument that its ***Unified Appeal Procedure*** violates Due Process in that it fails to provide a defendant with reciprocal rights of discovery is without merit. The court cited a few statutes and cases in an attempt to support their position.

The Supreme Court of Georgia decided that its ***Unified***

Appeal Procedure benefitted the criminal defendant against whom the death penalty is imposed rather than injured him in response to Petitioners' claim of violation of the Equal Protection Clause of the Fourteenth Amendment in that it singled out a particular defendant charged with a particular crime.

The Supreme Court of Georgia said that the Petitioners had failed to demonstrate how offering the defendant an opportunity to voice his objections concerning his counsel compelled the defendant to be witness against himself.

The Supreme Court of Georgia said they had found no authority to support defense counsel's position that criminal defendants in general are not intelligent, are uneducated and are consequently not capable of making a knowing, intelligent waiver of their rights.

The Supreme Court of Georgia said that its *Unified Appeal Procedure* did not violate due process by depriving a criminal defendant of the right to petition for writ of habeas corpus on the ground of ineffective assistance of counsel. The court said its procedure was designed "to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur."

Lastly, the Supreme Court of Georgia also denied Petitioners' assertion that the Court exceeded its authority by initiating the *Unified Appeal Procedure.*

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER COMPELLING A DEFENDANT IN A DEATH PENALTY CASE TO WAIVE HIS RIGHT BY WRIT OF HABEAS CORPUS TO CHALLENGE HIS CONVICTION ON THE GROUND HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND OTHER FUNDAMENTAL RIGHTS VIOLATES THE CONSTITUTION OF THE UNITED STATES

The United States Constitution states:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. Const. Art. I, §9, cl. 2.

The Writ was codified by Act of Congress and permits state prisoners to challenge collaterally their convictions on federal constitutional grounds. 28 U.S.C. §2241(c) [3].

Generally speaking, the only barrier to a state prisoner's proceeding under 28 U.S.C. §2241 (c) [3], is that he must first exhaust his state remedies. 28 U.S.C. §2254 (b).

Georgia provides by statute a mechanism for challenging collaterally a criminal defendant's conviction under what has been designated, colloquially, "The Habeas Corpus Act of 1967." Wilkes, *Post-conviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act,* 12 Ga. L. Rev. 249, 253 (1978). It was codified at Ga. Code Ann. §50-127 *et. seq*. As one author noted: "A claim of denial of a right guaranteed by the United States Constitution is explicitly made cognizable

by subsection 50-127(1), and the Georgia Supreme Court has held that a vast number of federal constitutional violations occurring prior to the conviction are grounds for relief." including claims by a petitioner that he was "denied . . . effective assistance of counsel." 12 Ga. L. Rev. 249, 253-254 (1978). Moreover, the United States Constitution states:

> . . . "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deprive any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

However, the Georgia General Assembly enacted legislation, designated "Criminal Procedure-Unified Review Procedure In Death Penalty Cases," which directed the Georgia Supreme Court to "establish by rules a unified motion for review procedure for the presenting to the sentencing court and the Supreme Court of Georgia of all possible challenges to the conviction, sentence and detention of defendants upon whom the sentence of death has been imposed, which challenges now are presented for review by motion for new trial, motion to withdraw a guilty plea, appeal, writ of habeas corpus, or any other writ, motion or proceeding cognizable in the courts of this state; . . ." 1980 Ga. Gen. Acts and Res., Vol. I, 390-392. The legislation was codified as Ga. Code Ann. §27-2538. The Georgia Supreme Court subsequently promulgated the rules which appear in *Unified Appeal*, 246 Ga. A-5 (1980). The rules were adopted by resolution of the Georgia General Assembly on April 14, 1981, pursuant to Ga. Code Ann. §27-2538. 1981 Ga. Gen. Acts and Res., Vol. I, p. 1532.

The *Unified Appeal*, among other things, requires the trial courts to inquire of the defendant on five separate occasions

whether he has any objections to defense counsel,"or to the manner in which defense counsel has conducted or is conducting the defense." (See, *e. g.*, 246 Ga. A-8.)

The first inquiry is made after indictment but before arraignment. 246 Ga. A-8 (6); the second inquiry is made at the defendant's motion hearing. 246 Ga. A-9 (4); the third inquiry is made immediately prior to commencement of trial. 246 Ga. A-10 (1) (c); the fourth inquiry is made after the close of evidence. 246 Ga. A-11 (2) (e); and the fifth inquiry is made after the charge of the court. 246 Ga. A-11 (3) (c).

On each of the five occasions when the trial court questions the defendant about the views he holds of his counsel, and of his counsel's competence, ". . . the fact of knowing, intelligent and voluntary waivers of rights that *are* invoked by the facts of the case" are duly recorded and transcribed. 246 Ga. A-8 (7) (2); A-8 (B) (2) (2); A-10 (A) (1)(b) (2); A-11 (A) (2) (d) (2); A-11 (A) (3) (b) (2).

This Court need look only to the "Statement of Purposes" of the *Unified Appeal* to determine that the sole motive for these inquiries to the defendant about his counsel are to compel a waiver of his right to challenge in any meaningful way his death penalty conviction by Writ of Habeas Corpus on the ground he was denied the effective assistance of counsel. As the *Unified Appeal* declares in its "Statement of Purposes," one purpose of the procedure is "to make certain that all matters which possibly could be raised in behalf of the defendant have been considered by the defendant and his attorney and either asserted in a timely and correct manner or knowingly, voluntarily and intelligently waived." 246 Ga. A-5(1).

Moreover, the Unified Appeal further declares: "It is . . . the purpose of these rules to insure that as many issues as possible which heretofore could be raised by Writ of Habeas Corpus or other post-trial procedure were timely raised prior

to or during trial." 246 Ga. A-13 (2) (a).

But of profoundest significance is the fact that the Georgia Supreme Court made a death penalty defendant's use of the Writ of Habeas Corpus exclusively dependent on whether he could first demonstrate as a threshold matter that "the procedure established by these rules *(Unified Appeal)* are inadequate or ineffective in any constitutional sense." 246 Ga. A-13 (2) (b).

However, the Court summarily settled that issue, at least to its own satisfaction, by declaring the entire *Unified Appeal Procedure*, its own creation, to be constitutional. *Unified Appeal*, _____ Ga. _____, 282 S. E. 2d 291 (1981).

Nevertheless, the court's requirement that a defendant under the death penalty make such a showing as a prerequisite to challenging his conviction by Writ of Habeas Corpus is flagrantly unconstitutional. Not only is such a requirement in clear derogation of 28 U.S.C. 2241 (c) (3), but it also violates the Due Process Clause of the Fourteenth Amendment which secures to U. S. citizens the right to petition for a Writ of Habeas Corpus to challenge illegal restraints on their liberty under the incorporation doctrine established by this Court.

By judicial fiat, the Georgia Supreme Court has effectively abolished the Writ of Habeas Corpus in death penalty cases, its facile declaration to the contrary notwithstanding. 246 Ga. A-13 (2) (a). Such radical judicial legislation clearly does not comport with the Constitution and cannot withstand even the most cursory examination by a neutral reviewing Court.

But even if a defendant under the death penalty could satisfy Georgia's requirement that he first demonstrate "the procedures established by these rules are inadequate or ineffective in any constitutional sense," it is clear that the *Unified Appeal* would render any effort to challenge a death penalty conviction

by Writ of Habeas Corpus a hollow formality.

Under *Unified Appeal*, a defendant is required to judge his counsel's competency of five separate occasions, the first time after indictment and before arraignment; the second time at the motion hearing; the third time immediately prior to trial; the fourth time after the close of evidence; and the fifth time after the charge of the court. 246 Ga. A-8, A-9, A-10, A-11. Moreover, on each of those occasions, "the fact of knowing, intelligent and voluntary waivers of rights . . . invoked by the facts of the case" are recorded. 246 Ga. A-8, A-9, A-10, A-11.

In Georgia, a person accused of a capital crime is not entitled to bail as a matter of right, and the setting of a bond is left to the discretion of the trial court. Ga. Code Ann. §27-901. Thus, a defendant against whom the death penalty is sought is in the least favorable position to evaluate the performance of his counsel inasmuch as he will generally be incarcerated as Appellant Wright is at the time of filing this Petition. The only source of information such a defendant has about his counsel is the counsel, himself. The defendant is unable to determine whether his counsel is performing adequately and would generally lack sufficient legal training, expertise and skill to make such an evaluation, even if he were free on bond.

As this Court sagely observed in *Johnson v. Zerbst*, 58 S. Ct. 1019 (1938), "The right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated laymen has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a

perfect one. He requires the guiding hand of counsel at every step in the proceeding against him." ***Johnson v. Zerbst, supra,*** 1022. The Court then held that one is not presumed to acquiesce "in the loss of fundamental rights," including the right to effective assistance of counsel, and "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." ***Johnson v. Zerbst, supra,*** 1023. However, it is obvious that Georgia's ***Unified Appeal*** seeks to beguile a defendant in a death penalty case into judging his counsel's performance on five separate occasions, and it is extremely unlikely that such a defendant would not invariably applaud his counsel's performance. Compelling a defendant to make that sort of evaluation under such circumstances at best puts him to a Hobson's Choice: Either declare approval of his counsel's performance, when that performance may be incompetent, even if the defendant could detect it, or object to counsel's performance and risk incurring his wrath and converting him to a half-hearted advocate.

However, the Georgia Supreme Court made it clear throughout its recitation of the ***Unified Appeal*** that a defendant's assertions about his counsel and other fundamental rights would be recorded "to the end it will be established that the right of the defendant is being waived knowingly, voluntarily and intelligently after due consideration by the defendant and defense counsel." 246 Ga. A-6(2).

Of course, no citation of authority is necessary for the proposition that incompetence of counsel is generally detected only after a diligent review by other counsel after a criminal trial has been concluded. But the ***Unified Appeal*** would apparently render the discovery of such incompetence meaningless in the face of a defendant's repeated assertions that he was satisfied with his counsel at all phases of the criminal proceeding. Too, this is even more critical in view of the fact that the Georgia Supreme Court has held that an indigent defendant upon whom the death penalty has been imposed is not entitled to appointed counsel on a habeas petition. ***State v. Davis,***

246 Ga. 200 (1980).

Thus, Georgia's *Unified Appeal* effectively abolishes the Writ of Habeas Corpus for defendants in death penalty cases and threatens to become a grave for the constitutional rights of those against whom the supreme penalty is sought. Accordingly, appellants respectfully ask this Court to declare *Unified Appeal* unconstitutional and reverse the judgment of the Georgia Supreme Court.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER COMPELLING A DEFENDANT IN A DEATH PENALTY CASE TO BE A WITNESS AGAINST HIMSELF AND DEPRIVING THE DEFENDANT OF RECIPROCAL DISCOVERY VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Under the *Unified Appeal Procedure*, from the First Proceeding, through the Guilt-Innocence Phase, *five times* the act says that the trial court, "shall give the defendant an opportunity to state any objections he may have to defense counsel, or to the manner in which defense counsel has conducted or is conducting the defense." *Unified Appeal*, 246 Ga. A-7 through A-12 (1980). All of this is prior to the defendant being convicted and sentenced.

If the defendant responds in the negative or sits in silence on the question, then his action or inaction will be used, and is intended to be used against him, at a later time.

The Fifth Amendment to the Constitution of the United States, says in part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property without due process of law . . . ."

The Supreme Court of Georgia has mandated that the trial court not only ask the defendant if he has any objections to defense counsel, but they have provided an "Outline of Proceedings" with the stated purpose to ". . . establish a procedure to be utilized by the court, defense counsel and the prosecuting attorney prior to, during and after trial to make certain that all matters which possibly could be raised in behalf of the defendant have been considered by the defendant and his attorney and either asserted in a timely and correct manner or knowingly, voluntarily and intelligently waived." See: ***Unified Appeal***, 246 Ga. A-5, ***Statement of Purposes***, A(1) (1980).

The Supreme Court of Georgia, under the ***Unified Appeal***, has also ordered the trial courts of this State to provide the defense counsel and the prosecutor a "Checklist" whereby, "the court also shall utilize the Checklist to determine that issues are not involved in the case . . . ." See ***Unified Appeal***, 246 Ga. A.6(2) (1980).

Among the issues that the Supreme Court is referring to are confessions, admissions, competency of the defendant, discovery, voir dire, examination of jurors, etc. See ***Unified Appeal***, A-19 through A-28 (1980).

If these issues are not brought to the trial court's attention at the proper time, by defense counsel or the defendant, they will be waived. These attempts by the trial courts to find the answers to the questions propounded not only causes the defendant to become a witness against himself but allows the State to gain discovery over the defendant without requiring the State to produce reciprocal discovery in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

In ***Wardius v. Oregon***, 412 U.S. 470, 93 S. Ct. 2208 (1973), 37 L. Ed. 2d 82, this Court struck down an Oregon statute

which required the defense to produce certain information as to an alibi defense at a particular time – before trial. The same statute did not provide reciprocal discovery from the State to the defense. Justice Douglas, in concurring in the result, said that this is "... a radical and dangerous departure from the historically and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself .... In either case, the defendant has been compelled to aid the State in his prosecution ...."

Through the "Outline of Proceedings" and the "Checklist" the State is given every conceivable amount of information which the defendant and his attorney possess and everything they intend to do toward the defense, before they do it. By this method, the State, through the court, pre-packages its case for trial, is not required immediately to give discovery to the defendant and precludes the defense from bringing up matters that were not brought to their attention at the scheduled time.

Compelling disclosures at a pretrial conference presents serious problems, especially concerning rhe court's power to do so, and is subject to constitutional limitations. In *United States v. Westmoreland* (SD Ind. 1967) 41 FRD 419, 426-427, the court said, in part: "Significantly, aside from discovery disclosures required to be made on motion and order pursuant to the explicit language of Rule 16, disclosure of other matter pursuant to a pretrial conference is not compulsory. Indeed, Rule 17.1 provides that '[a]t the conclusion of a conference the court shall prepare and file a memorandum of the matters *agreed* upon.' [Emphasis added.] Further, it provides that no admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. In short, disclosures from either side at a pretrial conference must be kept on a *voluntary* basis except as provided

in Rule 16 or pursuant to a valid order otherwise. (Emphasis added.)

"Fairly clearly, pretrial discovery by the prosecution is far-reaching. And it cannot in any sense be said to be matched by what is available to the defendant or by what he can keep from the prosecution – even when his 'immunity' from self-incrimination is thrown into the scales. While the possibility that the defendant may produce a hitherto undisclosed witness or theory of defense is always present, the opportunity for surprise is rendered practically illusory by the government's broad investigatory powers and by the requirement in many states that the defenses of alibi and insanity must be specially pleaded. The sum of the matter is that the defendant is not an effective participant in the pretrial process. It is to the trial alone that he must look for justice. Yet the imbalance of the pretrial preiod may prevent him from making the utmost of the critical trial date. And the trial, in turn has been refashioned so that it is increasingly unlikely that it will compensate for the imbalance before trial." 69 The Yale Law Journal 1149, 1192.

If *Unified Appeal* is left intact, the trials of Georgia criminal defendants will be refashioned to the extent that there will be no possibility for a fair trial, an impartial jury and an impartial and detached judge. The prosecutor will have been compelled to make the defendant informed of the nature and cause of the accusation as prescribed by the Sixth Amendment, yet the defendant will be compelled to become a witness against himself and will be compelled to divulge matters of strategy and defense which should be protected from discovery by the State and which disclosures would violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

CONCLUSION

The Supreme Court of Georgia has implemented a procedure which, if allowed to stand, will provide the State with discovery far in advance of when the Georgia law requires the State to provide discovery to the accused. The procedure is an attempt, by the Supreme Court of Georgia, to limit the appeal and habeas rights of a person convicted under such a procedure and it, in fact, compels the defendant to become a witness against himself. This procedure places the trial court in a position of having to advise the defendant and even guide the defendant through his trial, thereby causing the trial court to become counsel for the accused and the State thereby causing the court to interfere with matters which are properly the accused and his counsel. By having such an effect, exclusive domain of the defendant can only become confused, suspicious of his own counsel and tempted by the trial court to go into areas that even his own counsel may not deem necessary or wise.

Wherefore, Petitioners respectfully request that this Honorable Court grant them a Writ of Certiorari to show how Georgia's *Unified Appeal Procedure* violates Petitioners' rights under the United States Constitution ***before*** irreparable harm occurs to Petitioners.

Respectfully submitted,

Ronald G. Shedd per m.a.s.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEVE SLIGER
FRED LADON WRIGHT,

Petitioners,

VERSUS
STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed Petition for Certiorari on respondent by placing six copies in the United States mail, first class mail, postage prepaid, addressed as follows:

(three copies) Hon. Mike Bowers
Attorney General of the
State of Georgia
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District Attorney of Floyd
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All parties required to be served have been served. Done this 11th day of December, 1981.

Ronald G. Shedd pjmas

RONALD G. SHEDD

Appendix

NO. _____

Office - Supreme Court, U.S.
FILED
DEC 11 1981
ALEXANDER L. STEVAS,
CLERK

81-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STEVE SLIGER and
FRED LADON WRIGHT,

Petitioners,

versus

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

APPENDIX

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APPENDIX A

In the Supreme Court of Georgia

Decided: September 29, 1981

37734. SLIGER V. THE STATE

GREGORY, Justice.

Sliger and Wright were indicted for robbery and murder. When the State announced its intention to seek the death penalty, the trial court initiated pre-trial proceedings in accordance with the Unified Appeal Procedure. See 246 Georgia Reports, Appendix: Code Ann. §27-2538 (Ga. Laws, 1980, pp. 390-391): Ga. Laws, 1981, p. 1532. Defendants moved to dismiss or stay the proceedings on the ground that the Unified Appeal Procedure violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court denied the motion, but certified the cases for immediate review. We granted defendants' application for interlocutory appeal.

This appeal presents a facial attack on the Procedure without specific events having occurred below to be addressed. Consequently, the issues before us are not clearly focused. Nonetheless, we have undertaken the task of addressing each of defendants' enumerations of error as this challenge to the Unified Appeal Procedure presents a case of first impression.

(1) Defendants take the position that the Unified Appeal Procedure violates the Due Process Clause of the Fourteenth Amendment in that it provides "an all encompassing discovery tool for the State" without providing a defendant with means of reciprocal discovery in violation of Wardius v. Oregon, 412 U.S. 470 (93 SC 2208, 37 LE2d 82) (1972).

In that case the U. S. Supreme Court struck down an Oregon statute which prohibited a criminal defendant from introducing any evidence in support of his alibi defense if he failed to give the State pre-trial notice of his intention to rely on an alibi defense, but which made no provision for reciprocal discovery rights. The Court held that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." Id. at 472. Noting that while "the Due Process Clause has little to say regarding the amount of discovery which the parties may be afforded," the Court concluded that "it does speak to the balance of forces between the accused and the accuser." Id. at 474.

Defendants in this case do not cite any discovery rights given to the prosecution under the Unified Appeal Procedure which were not available prior to the establishment of the Procedure. Rather, defendants argue only that "[t]he defendants across the state have not been treated so nicely as to have the Supreme Court of Georgia order that discovery be made prior to trial and with such certainty." Pretermitting the determination of whether, by this argument alone, defendants have invoked a challenge of constitutional magnitude, we note that the Unified Appeal Procedure specifically outlines numerous federal and state discovery rights of which a defendant may avail himself: (a) Code Ann. §§27-1403 (right to receive a copy of the indictment and a list of the State's witnesses) Section I, "Checklist"; (b) discovery rights under Brady v. Maryland, 373 U. S. 83 (83 SC 1194, 10LE2d 215) (1963) and United States v. Agurs, 427 U.S. 97 (96 SC 2392, 49 LE2d 342) (1976); (c) Code Ann. §27-1302 (right to receive out-of-court incriminating statements made by defendant); (d) Code Ann. §27-1303 (right to discovery of scientific reports); (e) Code Ann. § 38-801 and §38-802 (right to subpoena documentary evidence); and (f) right of defendant charged with possession or sale of a prohibited substance under *Patterson v. State*, 238 Ga. 204 (232 SE2d 233)

(1977) to have an independent expert examine the substance. 1/ See Section L, "Checklist", Unified Appeal Procedure, supra. We further note that at the first pre-trial proceeding under the Unified Appeal Procedure, "[t]he prosecuting attorney shall state whether or not he intends to seek the death penalty." See 246 Ga. at A-7. Thus, defendants' argument that the Unified Appeal Procedure violates Due Process in that it fails to provide a defendant with reciprocal rights of discovery is without merit.

(2) Defendants next argue that the Unified Appeal Procedure violates the Equal Protection Clause of the Fourteenth Amendment. Defendants contend that the Procedure "burdens" criminal defendants against whom the State seeks the death penalty while not placing the same "burden" on criminal defendants in cases where the State does not seek the death penalty. Defendants do not cite any particular "burden" which the Unified Appeal Procedure imposes on death penatly defendants instead they lodge a complaint against the "scrutinization by the trial court. . . in a death penalty case" and argue that "the purpose of the Unified Appeal [Procedure] is to . . . prepackage the case before conviction."

We find that the Unified Appeal Procedure ***Benefits*** the criminal defendant against whom the death penalty is sought by insuring that all state and federal rights available to him are made known to him. See "Statement of Purposes," 246 Ga. A-5. There is no sanction more serious which can be imposed on a criminal defendant than the taking, by the State, of his life. The Unified Appeal Procedure is designed to protect the

---

1/ We have recently expanded the discovery right set out in *Patterson*, supra. to include a right, upon motion timely made, to independently examine "critical evidence" in the case, the nature of which "is subject to varying expert opinion." See, *Sabel v. State*, No. 37184, Decided June 30, 1981, at p. 12.

criminal defendant in this potentially precarious situation during each phase of the judicial process which may ultimately result in a conviction and sentence of death. Defendants have made no showing that the Unified Appeal Procedure unconstitutionally contravenes this goal. Nor have they shown how the Unified Appeal Procedure "prepackages the case before conviction." We, therefore, find this enumeration of error to be without merit.

(3) Defendants contend that the Unified Appeal Procedure is "in derogation of [their Fifth Amendment] right to remain silent" because by giving "the defendant an opportunity to state any objections he may have to defense counsel, or to the manner in which defense counsel has conducted or is conducting the defense" the defendant "is compelled to be a witness against himself".

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person. . . shall be compelled in any criminal case to be a witness against himself."

Defendants have not demonstrated how *offering* a criminal defendant the opportunity to voice objections concerning his counsel or the manner in which his counsel is conducting his defense *compels* him to be a witness against himself. To inquire of the defendant whether he is satisfied with his counsel *protects* not only his Fifth Amendment rights but other constitutional rights as well. We cannot say that a defendant has suffered the denial of a constitutional right when he is offered the opportunity, prior to and during trial, to state that he is dissatisfied with his attorney's assistance. By affording a defendant numerous opportunities to raise questions or objections concerning his counsel's assistance, the Unified Appeal Procedure recognizes that prior to or during trial the problem of ineffective assistance of counsel may be more suitably remedied than after conviction and the imposition of the death sentence.

(4) We have found no authority for the position taken by defendant Wight's counsel at oral argument, and he has cited none to use, that "criminal defendants in general are not intelligent, [are] uneducated and [are consequently] not capable of making a knowing, intelligent waiver of their rights."

While it is ture that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty," Johnson v. Zerbst, 304 U.S. 458, 462-3 (58 SC 1019, 82 LE 1461) (1938), where constitutional guarantees are at stake, the criminal defendant is entitled to the effective assistance of counsel to guide and warn him in determining whether to make an intentional reliquishment of a known right or privilege. See, in this regard, Boykin v. Alabama, 395 U.S. 238 (89 SC 1709, 23 LE2d 274) (1969); Schneckloth v. Bustamonte, 412 U.S. 218 (93 SC 2041, 36 LE2d 854) (1973); Miranda v. Arizona, 384 U.S. 436 (86 SC 1602, 16 LE2d 694) (1966). Where the criminal defendant elects to waive the right to assistance of counsel, the record *must* show that the defendant "intelligently and understandingly rejected the offer." Carnly v. Cochran, 369 U.S. 506, 516 (82 SC 884, 8 LE2d 70) (1961); Boykin v. Alabama, supra. See also, Johnson v. Zerbst, supra. while these cases uniformly place upon the State "an appropriately heavy burden" to demonstrate waiver, Schneckloth, supra, at 236, each recognizes that the average criminal defendant, absent a showing to the contrary, is capable of assisting in and participating in his defense and, once adequately apprised of his rights, is capable of making a knowing and intelligent decision of whether to abandon them.

(5) Defendants next argue that the Unified Appeal Procedure violated due process because it deprives a criminal defendant of the right to petition for writ of habeas corpus on the ground of ineffective assistance of counsel. We note initially that there is no right, constitutional or otherwise, to acquiesce in the ineffective assistance of counsel at trial in order to build

error into the rocord. We have interpreted the Sixth Amendment right to counsel "as the right to effective counsel." ***Young v. State***, 239 Ga. 53, 60 (236 SE2d 1) (1977). This means neither "errorless counsel. . . [nor] counsel judged ineffective by hindsight, but counsel. . . rendering reasonably effective assistance." Id; Mackenna v. Ellis, 280 F2d 592, 599 (5th Cir. 1960). Contrary to defendants' assertions, the purpose of the Unified Appeal Procedure is not to force a waiver of any rights. Rather, the Procedure is designed to "prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur." 246 Ga. at 45. Further, section (c) of Codr Ann. §27-2538 which authorizes this court to "establish by rules a unified motion for review procedure," provides. "[n]othing in this section or in the rules of the Supreme Court of Georgia shall limit or restrict the grounds of review or suspend the rights or remedies available through the procedures governing the writ of habeas corpus." Defendants' argument is without merit.

(6) Last, defendants argue that this court has exceeded its authority in making the rules which establish the Unified Appeal Procedure because the legislature "did not intend the Unified Appeal Procedure to be used as [it] . . .is now being used in the trial courts of this State." Rather, defendants contend that the "stated intent of the Legislature" was that the procedure be applied only to those "upon whom the sentence of death ***has been imposed.***" [Emphasis supplied.] Essentially, defendants argue that the procedure may not be used in cases where the State ***seeks*** the death penalty, but may be used only in those cases where the death penalty has been ***imposed***.

Georgia Laws, 1980, p. 390, 391 states as its purpose "to amend Code Chapter 27-25, relating to sentences and executions. . . so as to add a new Code section to be designated Code Section 27-2538; to provide that the Supreme Court of Georgia shall establish by rules a unified motion for review

procedure for presenting to the sentencing court and the Supreme Court of Georgia of all possible challenges to the conviction, sentence and detention of defendants upon whom the sentence of death has been imposed, which challenges now are presented for review by motion for new trial, motion to withdraw a guilty plea, appeal, writ of habeas corpus or any other writ, motion or proceeding cognizable in the courts of this state. . . ." The General Assembly passed a Resolution approving these rules for review procedures at the 1981 Session. See Georgia Laws, 1981. p. 1532.

Proceedings under the Unified Appeal Procedure are "applicable only in cases in which the death penalty is sought." 246 Ga. at A-5, and commence "[a]t the earliest possible opportunity after indictment." Id. at A-7. As noted above, the Unified Appeal Procedure establishes "a unified motion for review procedure;" this "motion" encompasses pre-trial, trial and certain review proceedings. See, 246 Ga. A-7 through A-16. It is logical that the Unified Appeal Procedure cannot be utilized to "review. . . challenges to the conviction, sentence [or] detention of defendants upon whom the sentence of death has been imposed," unless it is utilized in pre-trial and trial proceedings in cases where the death penalty is ***sought***. Defendants are correct in stating that review by this court under the Unified Appeal Procedure is not authorized unless the death penalty is imposed; however, to say that it is proper to apply the Unified Appeal Procedure in reviewing cases in which the death penalty is imposed but not proper to apply it to the pre-trial and trial stages of those cases in which the death penalty is sought is unpersuasive. The General Assembly clearly provided for the establishment by this court through the Unified Appeal Procedure of "a series of check lists to be utilized. . . prior to, during and after the trial of cases ***in which the death penalty is sought***. . . so that if the defendant is convicted and the sentence of death is imposed, the record and transcript of proceedings will be complete for unified review."

[Emphasis supplied]. Ga. Laws, 1980, 390-391. We find this enumeration to be without merit.

Judgment affirmed.

JORDAN, C.J., HILL, P. J., MARSHALL, CLARKE, & SMITH, J.J., CONCUR.

APPENDIX B

THE MOTION FOR A REHEARING WAS DENIED TODAY.
OCTOBER 15, 1981

JORDAN, C. J., HILL, P. J., MARSHALL, CLARKE, SMITH & GREGORY, J. J., CONCUR,

37734 SLIGER v. THE STATE

37739 WRIGHT v. THE STATE

Please substitute this opinion for the previous one.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STEVE SLIGER AND FRED LADON WRIGHT,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Did the Supreme Court of Georgia correctly determine that the Unified Appeal Procedure established by that court does not unconstitutionally require a defendant to waive any constitutional rights?

2.

Did the Supreme Court of Georgia correctly determine that the Unified Appeal Procedure does not compel a defendant to be a witness against himself and does not deny a defendant reciprocal discovery?

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No. 81-1149

IN THE

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STATE OF GEORGIA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioners, Steve Sliger and Fred LaDon Wright, Jr., were indicted in the

Superior Court of Floyd County on charges of murder and robbery on February 10, 1981. As the State was intending to seek the death penalty against both Petitioners, the trial court instituted pretrial proceedings under the Unified Appeal Procedure set forth by the Supreme Court of Georgia pursuant to Ga. Code Ann. § 27-2538. See Unified Appeal Procedure, 246 Georgia Reports, Appendix. Petitioners both subsequently filed a Motion to Dismiss or in the Alternative, Motion to Stay Proceedings under the Unified Appeal Procedure.

A hearing was held by the Superior Court of Floyd County on the Petitioners' motions. At that time Petitioners asserted various constitutional violations by the use of the Unified Appeal Procedure. The trial court denied the motions on April 8, 1981. (R.32) The Superior Court of Floyd County signed a certificate for an immediate

review of its decision. The Supreme Court of Georgia granted the application for immediate review on May 1, 1981.

The Supreme Court of Georgia considered whether the Unified Appeal Procedure (1) violates the fourteenth amendment by providing discovery to the State; (2) violates the equal protection clause by burdening criminal defendants faced with a possible death penalty; (3) violates a defendant's fifth amendment right to remain silent; (4) violates a defendant's rights because it may result in his waiving certain rights; and (5) deprives a defendant of his right to petition for a writ of habeas corpus. The Petitioners further argued that the court exceeded its authority in setting up the Unified Appeal Procedure. The court determined that none of these allegations had merit.

Petitioners have presently filed the instant petition for a writ of certiorari again challenging the Unified Appeal Procedure.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA CORRECTLY DETERMINED THAT THE UNIFIED APPEAL PROCEDURE ESTABLISHED BY THAT COURT DOES NOT UNCONSTITUTIONALLY REQUIRE A DEFENDANT TO WAIVE ANY CONSTITUTIONAL RIGHTS.

In 1980, the Georgia General Assembly enacted Ga. Code Ann. § 27-2538, providing for unified review of convictions in cases where the death penalty is imposed. In this code section, the General Assembly authorized the Supreme Court of Georgia to establish a unified review procedure in

death penalty cases. That court implemented such a procedure on August 25, 1980. See 246 Georgia Reports, Appendix. By resolution the General Assembly ratified and approved the procedure and rules set forth by that court. Resolution Act No. 47; H.B. No. 154, 1981 General Assembly. Thus, the procedure was clearly authorized by statute and ratified by the General Assembly.

Petitioners first assert that the Unified Appeal Procedure violates their constitutional rights by compelling a defendant to waive his right to challenge the effectiveness of his counsel by way of a petition for a writ of habeas corpus. Pretermitting the question of whether such a requirement would violate a defendant's rights is the question of whether the procedure even compels a defendant to waive such rights.

This allegation was addressed by the Supreme Court of Georgia on appeal. As noted by that court, "there is no right, constitutional or otherwise, to acquiesce in the ineffective assistance of counsel at trial in order to build error into the record." Sliger v. State, Wright v. State, 248 Ga. 316, 282 S.E.2d 291 (1981). As further noted by that court, the purpose of the Unified Appeal Procedure is "to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur." 246 Ga. at A-5. Thus, the procedure is not intended to force any waiver of rights. Sliger, supra at 320. It is furthermore specifically provided in Ga. Code Ann. § 27-2538(c) that "[n]othing in this section or in the rules of the Supreme Court of Georgia shall limit or restrict the grounds of review or suspend

the rights or remedies available through the procedures governing the writ of habeas corpus."

Under the Unified Appeal Procedure, a defendant is given several opportunities to express to the trial court any dissatisfaction he may have with his attorney's performance. This helps uncover potential personality conflicts as well as avoid a defendant's subsequent claim that he told his attorney to take a specific action which was refused. A defendant is not forced to make legal decisions as to what his attorney should do, but is merely given an opportunity to state any problems he may have. A defendant is not required to waive a right of which he is unaware.

Petitioners refer to the portion of the procedure requiring a record of the intelligent, knowing and voluntary waivers

invoked by the facts of the case. This clearly refers to rights relating to matters such as confessions and admission of evidence. A defendant could hardly waive the right to effective counsel if he did not know his counsel was ineffective. Defendants are frequently asked if they are satisfied with their attorney when entering guilty pleas. This presents a factor to be considered in looking at a claim of ineffective assistance of counsel, but would not necessarily operate as a waiver of a right to challenge counsel's performance.

Thus, it is clear that under the procedure a defendant is not compelled to waive his right to effective counsel, but is merely prevented from acquiescing in ineffective counsel.

Even if it were determined that a defendant was required to make a waiver of

his right to challenge the effectiveness of his counsel, Respondent asserts this does not create a violation of a defendant's constitutional rights. Defendants are required by law to challenge the composition of their jury panels prior to trial or be deemed to have waived the right to make such a challenge. Ga. Code Ann. § 50-127. See Francis v. Henderson, 425 U.S. 536 (1976). Federal courts have consistently recognized this waiver absent a showing of cause for failure to make the challenge and prejudice from the failure. Similarly, numerous states have a contemporaneous objection rule which is also recognized by the federal courts. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Provided a voluntary, intelligent and knowing waiver is shown by the record as required in Johnson v. Zerbst,

304 U.S. 458 (1938), there can be no constitutional violation in such waiver. If a defendant is fully aware of a constitutional right it is reasonable to require him to timely assert that right or waive it.

Petitioners also assert under this allegation that the Unified Appeal Procedure somehow serves to vitiate their right to file a writ of habeas corpus as specified in the United States Constitution. Respondent recognizes that the United States Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U.S. Const. Art. I, Section 9, cl.2. Petitioners, however, in their argument overlooked the distinction between the provision for a writ of habeas corpus set forth in the United StatesCode under 28 U.S.C. § 2254 and the separate provisions set up for state courts

under Ga. Code Ann. § 50-127. There is no constitutional provision requiring each individual State to provide for a separate action for a writ of habeas corpus apart from that set forth in the United States Code. Furthermore, even if Petitioner were required to waive his right to challenge the effectiveness of his counsel in state court, he is still entitled to make such a challenge in federal court. Thus, there is clearly no merit to Petitioners allegation in this regard and no federal constitutional question is presented for review by this court.

II. THE SUPREME COURT OF GEORGIA CORRECTLY DETERMINED THAT THE UNIFIED APPEAL PROCEDURE DOES NOT COMPEL A DEFENDANT TO BE A WITNESS AGAINST HIMSELF AND DOES NOT DENY A DEFENDANT RECIPROCAL DISCOVERY.

Petitioners' second allegation before this Court is based on an unjustified conclusion drawn from an incorrect interpretation of the Unified Appeal Procedure. In reading the procedure, Petitioners assert that a defendant is required to become a witness against himself in violation of the Fifth Amendment. This allegation is based on the portions of the procedure which provide a defendant with the opportunity to make objections as to his defense counsel. Contrary to the assertions of the Petitioners, this provision does not require a defendant to be a witness against himself, but merely, as noted previously, provides a defendant an opportunity to voice his complaint.

The Supreme Court of Georgia on appeal considered this allegation. As noted by that Court, "[Petitioners] have not demonstrated how offering a criminal defendant

the opportunity to voice objections concerning his counsel or the manner in which his counsel is conducting his defense compels him to be a witness against himself. To inquire of the defendant whether he is satisfied with his counsel protects not only his Fifth Amendment rights but other constitutional rights as well." Sliger, supra. This merely allows the court an opportunity to correct a problem concerning trial counsel at the appropriate time rather than proceeding through a trial and making a defendant proceed with counsel when he is dissatisfied with that counsel. By remaining silent concerning his counsel, a defendant is not becoming a witness against himself, but is merely indicating that at that time he has no knowledge of any problems existing with his counsel. Clearly, if a defendant does have problems or is dissatisfied with his counsel, his

should be expressed at the earliest possible time and not after trial. Thus, as found by the Supreme Court of Georgia, this is not a constitutional violation.

Petitioners also assert that the procedure provides discovery rights to the state without providing reciprocal discovery to a defendant. This question was considered by the Supreme Court of Georgia and found to be without merit. As found by that Court, no discovery rights were cighted by the Petitioners which have been given to the prosecution under the Unified Appeal Procedure which were not available prior to establishment of the procedure. Furthermore, the court noted that the procedure specifically outlines numerous federal and state discovery rights which may be used by a defendant, including the right to a copy of the indictment and list of witnesses, discovery rights under a

Brady motion, right to receive out-of-court incriminating statements made by the defendant, discovery of scientific reports, right to subpoena documentary evidence and the requirement that a prosecuting attorney inform a defendant whether or not he intents to seek the death penalty. Sliger, supra. Petitioners' reliance on Wardius v. Oregon, 412 U.S. 470 (1973), is misplaced. That case specifically dealt with a statute requiring a defendant to provide pretrial notice of an intention to rely on an alibi defense without making a provision for reciprocal discovery rights. The case noted that the United States Constitution under the due process clause does not say how much discovery may be afforded, although it does indicate that the discovery should be balanced. As noted previously, Petitioners have not indicated any discovery rights given to the prosecution

which were not previously available and have neglected to mention those numerous discovery avenues available to a defendant.

Those areas listed by the Petitioners which allegedly provide discovery for the prosecution merely provide the court with an opportunity to decide certain issues in a timely manner. It is clearly quite proper to require that a confession be challenged at the appropriate time and that the admissibility of questionable evidence be challenged at the appropriate time. Furthermore, a question such as the competency of the defendant obviously should be determined prior to trial when it is best handled. By requiring the trial court to make a determination as to whether these issues apply in a case, the Supreme Court does not provide discovery, but merely ascertains that these issues are resolved at the time when problems can

best be found by the court.

Respondent asserts that this phase of the procedure does not provide discovery to the state. Furthermore, a defendant is clearly provided with ample opportunity for discovery under state and federal law which balance any discovery tools that the prosecution could possible have. Thus, this issue presents nothing for review by this Court.

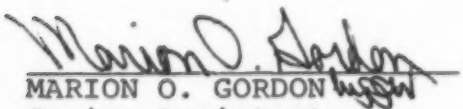
CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioners, Steve Sliger and Fred LaDon Wright.

Respectfully submitted,

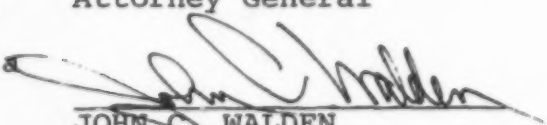
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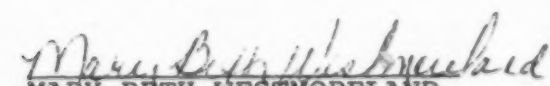


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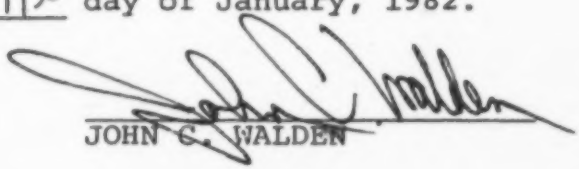
CERTIFICATE OF SERVICE

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioners by depositing three copies of same in the United States mail with proper address and adequate postage to:

Mr. Ronald G. Shedd
200 North Fifth Avenue
Rome, Georgia 30161

Mr. Christopher A. Frazier
P. O. Box 1604
Rome, Georgia 30161

This 11th day of January, 1982.



JOHN C. WALDEN